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No. 87-2098

In the Supreme Court of the United States

OCTOBER TERM, 1988

SAMUEL K. SKINNER,
SECRETARY OF TRANSPORTATION, APPELLANT

v.

MID-AMERICA PIPELINE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

REPLY BRIEF FOR THE APPELLANT

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We explained in our opening brief why Section 7005 of COBRA (100 Stat. 140-141) is constitutional. Congress's power to tax is subject to no greater restrictions on delegation than are its other legislative powers. See Gov't Br. 10-21. And in any event, the fees that the Secretary of Transportation collects under Section 7005 are not "taxes" in the strict sense used by the Constitution. See Gov't Br. 21-25. We also showed that Section 7005 – which sets forth the amount of fees to be collected, the persons liable for those fees, and the exclusive criteria that the Secretary may consider in establishing reasonable fee schedules – plainly meets this Court's standards for non-delegation. See, *e.g., American Power & Light Co.* v. *SEC,* 329 U.S. 90 (1946); *J.W. Hampton, Jr., & Co.* v. *United States,* 276 U.S. 394 (1928).

1. Appellee contends that Congress's power to tax is unlike its other Article I powers in that Congress may not enact a tax law that calls upon the Executive to make any discretionary judgments.[1] Appellee's argument is not based on the language of Articles I and II of the Constitution; nothing in those articles states that Congress must legislate in the tax area with unique specificity. Rather, appellee resorts to the claim that the "Historical Foundations" of the Origination Clause (Appellee Br. 10) show that Section 7005 is unconstitutional. Appellee's claim is unpersuasive.

The Origination Clause (Art. I, § 7, Cl. 1) provides that "All Bills for raising Revenue shall originate in the House of Representatives." [2] Thus, there plainly is an interplay between Congress's power "to lay and collect Taxes" and the Origination Clause: all tax bills must begin in the House of Representatives. But that is the only respect in which the Origination Clause modifies Congress's power to pass tax laws. Contrary to appellee's suggestion, the Origination Clause says absolutely nothing about the de-

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[1] We noted in our opening brief (Gov't Br. 18 n.10) that, in theory, this Court could create a new and more exacting non-delegation standard for tax laws – one that would allow the Executive to exercise some discretion under tax statutes, but not as much discretion as is allowed in other areas of law. As we anticipated (*ibid.*), however, appellee fails to set forth such a workable standard in its brief. Instead, appellee insists that the Executive may make no policy judgments in the field of taxation.

[2] Section 7005 of COBRA did originate in the House. The House Committee on Energy and Commerce drafted the provision, which was then included in H.R. 3500, 99th Cong., 1st Sess. See H.R. Rep. No. 300, 99th Cong., 1st Sess. 492 (1985). Thus, appellee cannot contend – and we do not understand it to contend – that the law violates the Origination Clause; rather, appellee is arguing that the principle of separation of powers, as informed by the Origination Clause, forbids Congress from giving the Executive discretionary authority in the field of taxation.

gree of specificity required in "Bills for raising Revenue." Indeed, as we explained in our opening brief (Gov't Br. 12-13), the Framers understood that a tax law, like any other act of Congress, could call upon the Executive to use its discretion in executing the statute.

Appellee notes (Br. 12) that the proponents of the Origination Clause wanted the power to tax to rest initially in the House of Representatives because it was more "immediately the representatives of the people" than was the Senate. That observation is true but irrelevant. In the unamended Constitution, the Senate was composed of persons selected by state legislatures. See Art. I, § 3. Not until 1913, with the adoption of the Seventeenth Amendment, were senators directly elected by the people. Accordingly, the clear choice of the drafters of the Origination Clause was that persons elected by the people should have the initial and immediate responsibility over tax matters. See Appellee Br. 12-13.

That constitutional plan was followed in this case. The elected members of Congress—first in the House and then in the Senate—duly considered and then enacted Section 7005. To be sure, Congress has asked for the Executive's help in implementing the statutory directive. But the elected Congress retains plenary control over the schedule of fees adopted by DOT pursuant to Section 7005. Congress may, in its judgment, modify DOT's fee schedule at any time, or amend or repeal Section 7005 altogether. There is no evidence, either in the text of the Constitution or the remarks of the Framers, that the proponents of the Origination Clause thought the people's "immediate representatives" (Appellee Br. 12) in Congress could not ask the Executive to exercise judgment in executing duly enacted tax measures, subject to the ordinary modes of congressional oversight and control. Such a remarkable proposition—one that would set Congress's power to tax

apart from its other broad and important powers—surely would have found its way into some provision in the text or recorded history of the Constitution if that were the Framers' intent.

Appellee and its amici nevertheless contend (Appellee Br. 21-25; Chamber of Commerce Br. 6-8) that Section 7005 circumvents the Origination Clause by allowing tax "laws" to "originate" in the Department of Transportation. That contention amounts to an unsupported attack on all statutes that give discretionary authority to the Executive.[3] There is no doubt that federal agencies and Executive departments may adopt rules of general application without running afoul of the Constitution's procedures for the enactment of laws—*i.e.*, approval by majorities in both Houses and presentment to the President. See, *e.g.*, *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943). Agencies that adopt such regulations are not making a "law" in the constitutional sense; they are executing Congress's law by making "subordinate rules within prescribed limits" (*Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421 (1935)). See *INS* v. *Chadha*, 462 U.S. 919, 953 n.16 (1983).[4] Hence, the Secretary of Transportation

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[3] Appellee's claim is also inconsistent with this Court's holding in *J.W. Hampton Jr., & Co.* v. *United States*, *supra*, in which the Court upheld a statute giving the Executive broad authority to set tariffs—a type of tax—on imported goods. The Court in *J.W. Hampton* never suggested that the statute at issue in that case allowed a tax statute to originate with the President instead of the House of Representatives.

[4] We thus agree with appellee's observation (Br. 19) that the Executive does not have the power to make laws in the constitutional sense; it has the "power to adopt regulations to carry into effect the will of Congress" by filling in gaps in a statute. *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 134 (1936). Such regulations are not, strictly speaking, the exercise of "legislative power." *Mistretta* v. *United States*, No. 87-7028 (Jan. 18, 1989), slip op. 10.

plainly did not enact a law, requiring the approval of both Houses and the signature of the President, when the Secretary adopted fee schedules under Section 7005.[5]

2. Appellee devotes much of its brief to the claim that Section 7005 "eliminates legislative accountability" (Appellee Br. 21). That suggestion is obviously not correct. Congress enacted Section 7005 in 1986. At that time, Congress established a new fee to pay for pipeline safety programs. Congress directed the Secretary of Transportation to collect those fees from pipeline companies. Congress specified the exclusive criteria that the Secretary could consider in making reasonable fee schedules. And Congress sets the aggregate amount of fees collected each year by passing an appropriations law. Congress is responsible for all those basic decisions. The process required by the Constitution to maintain political accountability was followed in this case; appellee simply does not like the substantive outcome.[6]

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[5] Appellee incorrectly contends (Br. 18-19), that the Treasury Department's ability to promulgate tax regulations (26 U.S.C. 7805) is unlike the rule-making power of other Executive Departments. This Court has ruled that, if the Commissioner of Internal Revenue acts within Congress's mandate, the "choice among reasonable interpretations is for the Commissioner, not the courts." *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 488 (1979). Similarly, the Court has upheld IRS rules that "implement the congressional mandate in some reasonable manner." *United States* v. *Correll*, 389 U.S. 299, 307 (1967) (upholding regulation defining "travel expenses").

[6] Section 7005 of COBRA was not a novel idea that appeared in 1986 without warning. When Congress authorized appropriations for the two pipeline-safety programs in 1981, members of the House of Representatives noted that Congress should consider whether "the expense of delivering the product safely ought to be borne by the pipeline user, rather than the general taxpayer." H.R. Rep. No. 89, 97th Cong., 1st Sess. Pt. II, at 13 (1981).

Perhaps appellee is truly claiming that Section 7005 reduces Congress's accountability to a point that the Constitution should not permit. But this Court's standards for non-delegation are themselves designed to gauge whether that point has been passed. See generally *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 529-530 (1935). Those standards reflect the understanding that Congress must make fundamental policy choices, and yet often obtain "the assistance of its coordinate Branches." *Mistretta* v. *United States,* No. 87-7028 (Jan. 18, 1989), slip op. 10. Thus, if a statute satisfies the tests for non-delegation found in *American Power & Light* and *J.W. Hampton,*[7] it necessarily follows that Congress did not violate the principle of separation of powers. And it also follows that members of Congress are as politically accountable as the Constitution demands.

b. Appellee repeatedly claims (Br. 8, 45-49) that Congress was "unwilling" to make all decisions regarding Section 7005 fees because congressmen feared adverse political consequences. There is no reason for this Court to accept that characterization of Congress's action. There surely is nothing in the record or the legislative history cited by appellee to support that view. Congress could have rationally decided that the Secretary of Transportation was better situated than it was to make detailed decisions about how the fees should be allocated among pipeline operators. DOT administers the two pipeline safety programs. It is intimately familiar with the program costs made necessary by the activities of the regulated entities. And DOT is the first to know if its administrative programs change in a way that would justify an adjustment of fee schedules. Thus, Congress acted rationally in directing

[7] Appellee does not question our view (Gov't Br. 26-28) that Section 7005 clearly satisfies those well-established tests.

the Secretary of Transportation to execute Section 7005 by making and, if necessary, adjusting reasonable fee schedules under prescribed criteria.

In *Yakus* v. *United States,* 321 U.S. 414 (1944), the Court upheld a statute giving the Price Administrator the power to fix fair and equitable commodity prices. In *Federal Power Comm'n* v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944), the Court upheld a law commanding the Federal Power Commission to determine just and reasonable rates. And in *Lichter* v. *United States,* 334 U.S. 742 (1948), the Court sustained a law that allowed the Executive to recover excess profits earned on military contracts. In all of those cases, Congress could have made additional policy judgments and written more specific laws. But the Court did not suggest that Congress's choice to legislate with a broad brush necessarily showed an "unwillingness" to make difficult decisions. When Congress legislates within the limits of the non-delegation doctrine, this Court does not second-guess the wisdom of the law. Quite simply, " 'Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers.' " *Mistretta* v. *United States, supra,* slip op. 18 (quoting *Yakus* v. *United States,* 321 U.S. at 425-426). See also *Mistretta,* slip op. 4 (Scalia, J., dissenting) ("we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law").

c. Appellee argues (Br. 26-27) that Section 7005 is an unconstitutional delegation of legislative power because it authorizes DOT to collect fees to pay for a part of its budget and therefore relieves Congress of any responsibility for examining DOT's annual budget with care. That argument is wrong on both the law and the facts. DOT may spend only those sums of money that are appropri-

ated by Congress. Thus, each year Congress must examine DOT's budget—including the costs of the two pipeline safety programs—when Congress passes an appropriations law. And contrary to appellee's suggestion, experience under the Act shows that Congress has not given DOT a free reign significantly to increase its costs (and thus the amount of fees collected). As we noted in our opening brief (Gov't Br. 4 n.2), the total federal appropriations for the two programs for fiscal years 1986, 1987, and 1988 were $7.773 million, $8.523 million, and $8.550 million, respectively. Accordingly, there is no basis for believing that Section 7005, which returns to Congress's attention every year as it passes an appropriations law, gives DOT a dangerous and unconstitutional mandate to act without any threat of congressional review.

3. Appellee next argues (Br. 35-49) that Section 7005 is unconstitutional because the authority given to the Secretary is not Executive power. That argument may simply be a restatement of its main point that the Taxing Clause precludes Congress from giving the Executive any discretionary authority in the field of taxation. Alternatively, appellee may be arguing that tax matters necessarily involve policy judgments and such decisions are better left to Congress. But as the Court recently noted in *Mistretta,* this Court's "cases do not at all suggest that delegations of [authority] may not carry with them the need to exercise judgments on matters of policy" (slip op. 17). Accord *id.* at 4 (Scalia, J., dissenting) (noting that the Court is not competent to review the permissible degree of policy judgment that may be left to the Executive). Indeed, the Secretary's policy decisions in this case—which are limited to selecting among prescribed criteria when he writes fee schedules—are most modest when compared, for example, to the Price Administrator's power to fix fair and equitable commodity prices (see *Yakus, supra*) or the

Federal Communication Commission's power to regulate broadcasting in the public interest (see *National Broadcasting Co., supra*).[8]

Moreover, contrary to appellee's contention (Br. 23, 38-39), the power to set tax rates is not unique for purposes of non-delegation. That was made clear in *J.W. Hampton, supra,* where the Court upheld a law giving the President the power to set duties on imported goods. The Court stated, in words that plainly refute appellee's contention, that the "same principle that permits Congress to exercise its rate making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise." 276 U.S. at 409.

Appellee nevertheless contends (Br. 43-46) that the Secretary's power under Section 7005 is the "unadorned" power to make law, not the power to make judgments incident to the execution of the law. That argument is foreclosed by *Mistretta* v. *United States, supra,* where the Court upheld a statute that gave the United States Sentencing Commission one job—to make binding sentencing guidelines for the federal courts. Here, by contrast, DOT has many regulatory functions, including the job of administering the two pipeline safety programs. In Section 7005, Congress gave DOT the additional task of collecting fees to pay for those programs. It cannot be said that DOT is exercising "unadorned" lawmaking power any more than the United States Park Service does when it sets fees

[8] Accordingly, there is no constitutional significance to appellee's observation that the Secretary, in implementing Section 7005, must consider "issues of fairness and equity" (Appellee Br. 40). That is true with many other statutes that have been upheld by this Court. See Gov't Br. 10, 28.

for the use of national parks (16 U.S.C. 460*l*-6a) or the United States Customs Service does when it sets fees for processing imported goods (19 C.F.R. 24.23). The fees that DOT collects are part and parcel of its regulatory program.

4. a. We explained in our opening brief (Gov't Br. 21-25) that, even if the Constitution somehow requires Congress to make all judgments regarding taxation, the fees collected under Section 7005 are not "taxes" in the constitutional sense. A law that requires a party to reimburse the government for the costs of a program of regulation made necessary by that party's activities is properly regarded as imposing a "fee" rather than a "tax." Appellee disagrees with that conclusion (Appellee Br. 28-32) but accepts many of its premises. For instance, appellee states that a "fee" is "what the Government charges for services performed" (Br. 30). And appellee argues that "fees are measured by the specific costs that an individual firm imposes on a government agency" (*ibid.*). Appellee then contends, however, that fees must be linked to what are in effect the variable costs associated with the activities of a single firm, and may not include any allocation of fixed costs or agency overhead (*ibid.*). Thus, appellee concedes that the government would be imposing a fee if it charged appellee for the costs of inspecting its pipelines. But appellee contends that the government is imposing a tax in this case because it requires appellee to pay for a portion of governmental costs that are related to more than one pipeline firm—*e.g.*, the costs of setting industry standards.

There is no basis in the Constitution for appellee's limitation on the definition of a "fee." We agree with appellee that a fee is measured by the governmental costs made necessary by a firm's activities. Those costs, however, may properly include a pro rata share of the expenses incurred in developing, setting, and administering the general

standards that are used in regulating the activities of all pipelines. Contrary to appellee's assertion, those general costs are as much the result of appellee's activity as are the specific expenses of inspecting appellee's pipelines. See *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n,* 296 U.S. 261, 266 (1935) (exactions collected under law were fees to reimburse governmental costs even though ship owner's "vessels have not been given any special assistance"). As the Court explained in *Head Money Cases,* 112 U.S. 580 (1884), and *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n, supra,* such exactions, which may be regarded as simply a part of appellee's cost of doing business, are properly regarded as a fee.

b. Appellee misunderstands our reliance on *Head Money Cases* and *Clyde Mallory Lines.* As appellee notes (Br. 33-34), those cases do not address the non-delegation doctrine, but they clearly do define the constitutional distinction between "taxes" and "fees." And under the distinction drawn in those cases, the fees collected under Section 7005 are not taxes for the general support of the government. See Gov't Br. 21-23.

Appellee maintains (Br. 31) that, under our view of fees, almost every exaction by the government could be considered a fee and not a tax. That is obviously incorrect. For example, the enormous governmental costs associated with social-welfare programs and defense are clearly paid for by taxes rather than fees. No attempt is made to recover the costs of these programs from those who directly benefit; nor is any attempt made to recover the costs from those whose activities give rise to the need for such programs. We acknowledge that there may be close cases where the distinction between a fee and a tax becomes less certain. But that is not true here. The regulatory costs

created by the activities of appellee and other hazardous liquid pipeline operators are discrete and identifiable. Pipeline operators are required only to pay their fair share of those costs; they are not required to subsidize other governmental programs. Thus, Section 7005 does not impose a "tax" in the strict constitutional sense.

For these reasons, as well as the reasons in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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